Supreme Court, U.S.
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No. 89-1751

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

EASTERN PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "ARMED FORCES NEWS",
Petitioner,

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation) T/A "THE MILITARY NEWS", KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; and LOUISE MARTINS,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENTS

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QUESTIONS PRESENTED

I. Whether the Court below was correct in its determination that the Amended Complaint failed to allege facts which would support a finding that Respondents' activities resulted in a sufficient pattern of racketeering activity as described in 18 U.S.C. §§ 1961 *et seq.*?

II. Whether the Court below was correct in its determination that the Amended Complaint failed to allege facts which would support a finding that Petitioner's works were protected by the Copyright Act, 17 U.S.C. §§ 101 *et seq.*?

III. Whether a Court may dismiss an Amended Complaint under F.R. Civ. P. 12(b)(6) when the Amended Complaint fails to allege essential elements of a cause of action?

PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b) of the Supreme Court Rules, all parties to the proceeding appear in the case caption. In accordance with Rule 29.1 of the Supreme Court Rules, Chesapeake Publishing and Advertising, Inc. has neither a parent company nor any subsidiaries.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the United States District Court for the District of Maryland was entered on December 12, 1986. It was not published. The decision appears at Appendix F, pp. 18a-23a.

The initial opinion of the United States Court of Appeals for the Fourth Circuit was entered on October 16, 1987. It was published at 831 F.2d 488 (4th Cir. 1987) (Appendix C, pp. 5a-15a). The subsequent opinion of the Fourth Circuit is not yet published. That decision is set forth at Appendix A, pp. 1a-3a.

This Court's decision on Petitioner's first Petition for Writ of Certiorari was published at 109 S.Ct. 3234 (1989). (Appendix B, p. 4a).

JURISDICTIONAL STATEMENT

This Court's opinion remanding the case to the Fourth Circuit was entered on February 9, 1990. The initial opinion of the Fourth Circuit was entered on October 16, 1987. Upon remand, the Fourth Circuit affirmed its earlier ruling on February 9, 1990. The decision of the District Court was issued on December 12, 1986.

Jurisdiction is conferred upon this Court to review the decision of a court of appeals pursuant to 28 U.S.C. §§ 1254(1) and 2101(c).

Jurisdiction was conferred upon the District Court in accordance with 28 U.S.C. §§ 1331, 1337 and 1338.

RELEVANT STATUTORY AUTHORITY

The pertinent text of the relevant statutory provisions is set forth in the Appendix. These statutory provisions are: 18 U.S.C. §§ 1961, *et seq.*; 17 U.S.C. §§ 405, *et seq.*; and Fed. R. Civ. P. 12(b)(6).

STATEMENT OF THE CASE

Respondents do not deem it necessary to set forth a detailed statement of the case to point out inaccuracies or omissions in Petitioner's Statement of the Case. Respondents direct this Court's attention to the fact that the courts below made no findings of fact. The courts below accepted, for the purposes of the Motion to Dismiss, the well pled factual allegations contained in the Petitioner's Amended Complaint. This Court should note, however, that Petitioner's Affidavit (at Appendix G of the Petition) and exhibits were not at issue since they were neither included nor referenced in the Complaint or Amended Complaint.

REASONS FOR DENYING THE WRIT

Petitioner has given no special and important reasons for this Court to exercise its special discretion in granting Certiorari. Petitioner has not demonstrated, through its facts or arguments of law, a conflict in the circuits or an inappropriate treatment of a federal question.

The Courts below correctly applied 18 U.S.C. §§ 1961 *et seq.*, the Racketeer Influenced and Corrupt Organizations Act ("RICO"), to the facts alleged in Petitioner's Amended Complaint in dismissing the civil RICO claims. The United States Court of Appeals for the Fourth Circuit, relying on the language of the statute and this Court's treatment of that language in *H. J., Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893 (1989), correctly concluded that Petitioner failed to allege facts sufficient to support finding of a "pattern" of racketeering activity.

The decisions of the courts below do not present this Court with a judicially created impediment to the statutory elements of the copyright laws. Rather, the courts below applied the words of the statute, 17 U.S.C. § 405(a), to the facts alleged in Petitioner's Amended Complaint and achieved the proper result.

Petitioner has had two opportunities to state claims upon which relief can be granted and has failed to do so. Rather than amend the Complaint to state such facts, Petitioner has chosen to rest on the inadequate Amended Complaint.

For the reasons stated this Court should deny the Writ of Certiorari sought by Petitioner.

SUMMARY OF ARGUMENT

Petitioner's Amended Complaint fails to allege the essential element of the causes of action asserted. As a result, dismissal pursuant to Federal Rule of Civil Procedure 12(b)(6) was appropriate.

Petitioner's Amended Complaint does not set forth facts sufficient to demonstrate a pattern of racketeering activity. Contrary to the requirements outlined in *H. J. Inc. v. Northwestern Bell Telephone Co.*, 109 S. Ct. 2893, Petitioner fails to allege continuity of racketeering activity or the threat of continuing racketeering activity. Petitioner has not set forth any facts to support a RICO pattern.

Petitioner has not demonstrated that its failure to place copyright notice on its newspapers is excused under 17 U.S.C. § 405(a). No facts have been advanced to demonstrate that either a "relatively small number" of copies were distributed without notice, or, that a reasonable effort to place notice on distributed copies was made. This failure is fatal to the copyright protection sought by Petitioner.

Petitioner has failed to allege certain essential elements to the causes of action asserted. Consequently, the Amended Complaint fails to state claims upon which relief may be granted. Accordingly, this Court should deny the Petitioner's Writ for Certiorari.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY CONCLUDED THAT THE AMENDED COMPLAINT FAILED TO ALLEGE FACTS SUFFICIENT TO SUPPORT A FINDING THAT RESPONDENTS WERE INVOLVED IN A PATTERN OF RACKETEERING ACTIVITY AS SET FORTH IN 18 U.S.C. §§ 1961 *et seq.*

A. Eastern failed to allege facts which, if proven to be true, sufficiently constitute a "pattern" of racketeering activity.

Both the district court and the circuit court correctly determined that the Amended Complaint failed to allege a pattern of RICO activity. This Court in *H.J.* held that a "pattern" is proven when a plaintiff shows that the

racketeering predicate acts "are related, *and* that they amount to or pose a threat of continuing criminal activity." *H.J.*, 109 S.Ct. at 2900 (emphasis in original). Petitioner does not sufficiently allege such a "pattern."

A "pattern" is defined by the relationship of the criminal acts. *Id.* at 2901. A pattern entails "criminal acts that have the same or similar purposes, results, participants, victims or methods of commission, or otherwise are interrelated by distinguishing characteristics and are not isolated events." *Id.* (quoting 18 U.S.C. § 3575(e) (1970)). In contrast, "continuity" requires either "a closed period of repeated conduct," or "past conduct that by its nature projects into the future with a threat of repetition." [1] *Id.* at 2902.

This Court in *H.J.* defined the continuity requirement consistently with the Fourth Circuit's case-by-case approach set forth in *International Data Bank, Ltd. v. Zepkin*, 812 F.2d 149, 155 (4th Cir. 1987).[2] Similar to the "flexible approach" employed by this Court in *H.J.*, 109 S.Ct. at 2900, the Fourth Circuit in *Zepkin* held that "no mechanical test can determine the existence of a RICO pattern." *Zepkin*, 812 F.2d at 155. Acknowledging that a threat of continuing racketeering predicate acts "depends on the specific facts of each case," this Court provided examples of how the continuity elements could be met. *H.J.*, 109 S.Ct. at 2902. It therefore determined that continuity could be established by: (1) proving a series of related predicates extending over a substantial period of time; (2) proving that related predicates involve a distinct threat of long-term racketeering activity, either implicit or explicit; (3) showing that the predicate

---

[1] Accordingly, a single scheme can state a RICO claim *if* it encompasses multiple related predicates that amount to or threaten future criminal activity. *H.J.*, 109 S.Ct. at 2899.

[2] *Zepkin* was cited with approval in *H.J.*, 109 S.Ct. at 2898 n.2, along with other Courts of Appeals' decisions which rejected the notion that multiple schemes are necessary to form a RICO pattern.

acts are a part of the ongoing entity's regular way of doing business; or (4) showing that the predicate acts are a regular way of conducting the defendant's ongoing legitimate business or of conducting or participating in an ongoing legitimate RICO "enterprise." *Id.*

Although this Court left to future cases the further refinement of a "pattern of racketeering activity," it cautioned that short-term criminal conduct was inadequate. "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy this requirement. Congress was concerned in RICO with long-term criminal conduct." [3] *Id.* Measured against these standards, it is clear that Eastern failed to adequately allege a pattern of racketeering activity.

The Fourth Circuit correctly held that from Eastern's allegations, "[t]here is no inference that the scheme embodies a threat of continued like activity in the future." [4] *Eastern*, 831 F.2d at 492. Applying this Court's standards as set forth in *H.J.*, the Fourth Circuit found that: (1) the related predicates do not extend over a substantial period of time (the predicates occurred "on various occasions in March, April, and May, 1986," 831 F.2d at 490); (2) the predicate acts do not involve a distinct threat of long-term racketeering activity ("a quite narrow business context . . . [that contains] no inference

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[3] *See also* 109 S.Ct. at 2902 n.4 ("[The notion that] very short periods of criminal activity that do not in any way carry a threat of continued criminal activity constitute [a pattern] is mistaken . . . [W]hen Congress said predicates must demonstrate 'continuity' before they may form a RICO pattern, it expressed an interest that RICO reach activities that amount to or threaten long-term criminal activity.")

[4] The Fourth Circuit never adopted the Eighth Circuit's "multiple schemes" RICO pattern requirement, which this Court rejected in *H.J.* The use of the word "scheme" to describe the limited nature of alleged criminal conduct here was not critical to the Fourth Circuit's decision. Rather, the brief, non-recurring nature of the conduct enabled that court to conclude that no threat of continued like activity arises from Eastern's allegations.

that the scheme embodies a threat of continued like activity in the future," *id.* at 492); (3) the predicate acts are not part of Chesapeake's regular way of doing business (*e.g.*, a single, *non-recurring* scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context, *id.*); and (4) the predicate acts are not part of Chesapeake's ongoing legitimate business or of conducting or participating in an ongoing or legitimate RICO enterprise (see (3) above). Eastern clearly failed to meet the *H.J.* requirements for a pattern of racketeering activity.

Viewing the allegations in the light most favorable to Eastern, the pleadings, at best, describe a short, narrowly focused criminal episode by Eastern's former agents assisted by their attorneys in order to gain unfair competitive advantage through the establishment of a competing publishing business. Most significantly, despite amending its Complaint four months after its original filing, Petitioner never alleged a single predicate act occurring after May 1986. Clearly the alleged predicate acts were concluded several weeks before this action was even initiated. Noticeably absent are the "criminal dimension and degree" necessary to set forth a racketeering pattern. *Zepkin*, 812 F.2d at 155.

Applying the *Zepkin* test, implicitly recognized as proper by this Court in *H.J.*, the Fourth Circuit correctly concluded that Petitioner's allegations do not properly allege a pattern of racketeering activity. Petitioner's Amended Complaint fails to allege facts which, if proven to be true, would support liability under RICO.

II. THE CIRCUIT COURT CORRECTLY DETERMINED THAT PETITIONER'S AMENDED COMPLAINT FAILED TO STATE A CLAIM FOR COPYRIGHT INFRINGEMENT.

A. Eastern's failure to place copyright notice on the newspapers and advertisements is not excused under 17 U.S.C. § 405(a).

The Circuit Court correctly applied 17 U.S.C. § 405 to the facts alleged in the Amended Complaint in determining that the Complaint failed to state a claim upon which relief could be granted with respect to copyright infringement. The registered copyright affords no protection to Eastern unless the failure to place notice is excused under 17 U.S.C. § 405(a). This section excuses omission of notice if:

> (1) The notice has been omitted from no more than a relatively small number of copies or phonorecords distributed to the public; or
>
> (2) Registration for the work has been made before or is made within five (5) years after the publication without notice, *and* a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

17 U.S.C. § 405(a) (emphasis added).

The Amended Complaint fails to set forth facts which would indicate that only a "relatively small number" of newspapers were distributed without notice. In fact, it appears from the Amended Complaint that all of Petitioner's newspapers were printed without notice of copyright prior to the institution of this action. *See* Amended Complaint pp. 9-10, ¶ 19. "Plaintiff also has deposited prior published serial issues of this newspaper . . . for copyright registration and has included notice of copyright on all subsequent issues prior to their publication." Consequently, Petitioners cannot meet the first exception of § 405 because based on the facts alleged in the Amended

Complaint, all of Petitioner's newspapers, both the disputed issues in this action and those which predated the disputed issues, were injected into commerce without notice. *Long v. CMD Foods, Inc.*, 659 F. Supp. 166, 168 (D. Ark. 1987).

Petitioners fail to meet the second prong of § 405(a) because the Amended Complaint is devoid of any allegations or facts which would show that any reasonable effort was made to attach notice "to all copies . . . that are distributed to the public in the United States after the omission has been discovered." 17 U.S.C. § 405; *CMD Foods, Inc.*, 659 F.Supp. at 169.

B. Eastern failed to allege essential elements of copyright infringement sufficient to withstand a Federal Rule of Civil Procedure 12(b)(6) Motion to Dismiss.

Applying the *Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F.2d 189 (2nd Cir. 1985), view which allows § 405 cure for both intentional and unintentional omissions provides little relief to Petitioner. Whether or not the omission was intentional is not dispositive of the claim. The failure, however, to allege circumstances which, if proven to be true, would grant relief is dispositive of the issue. Petitioner's Amended Complaint fails to state a claim for which relief can be granted because it neglects to allege the most important of elements in a copyright infringement action; that is, a valid copyright.

To make out a *prima facie* case of copyright infringement, a plaintiff must show ownership of a valid copyright and subsequent copying by the defendant. *Southern Bell Telephone and Telegraph v. Associated Telephone Directory Publishers*, 756 F.2d 801, 810 (11th Cir. 1985); 3 M. Nimmer, *Nimmer on Copyright*, § 13.01, at 13-3 (1987). In this action, Petitioner has claimed copyright protection "in two specific issues of its publication, each of which necessarily had not only a limited period of distribution but also a very limited lifespan in the

hands of a consumer." *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.*, 831 F.2d 488, 491 (4th Cir. 1987). The obvious result is that any subsequent notice placed on different issues of "Armed Forces News" would be wholly ineffective in apprising subsequent users that past issues of "Armed Forces News" were protected under the copyright laws. *Id.* The Circuit Court was correct in concluding that to comply literally with the second prong of § 405(a)(2) one must "proceed on the premise that products protectable under § 405(a)(2) must have continued distribution, at least from a retailer, as well as continued use in the hands of a consumer or retailer." *Id.*; *see also Lifshitz v. Walter Drake and Sons, Inc.*, 806 F.2d 1426, 1433 (9th Cir. 1986).

The court correctly pointed out that in *Canfield v. Ponchatoula Times*, 759 F.2d 493 (5th Cir. 1985), the second prong of § 405(a)(2) was applied to a newspaper. It is important to note, however, that *Canfield* dealt specifically with advertisements which appeared in the newspaper and have the ability to be reproduced in subsequent issues of the newspaper. The § 405(a)(2) test was not applied to the entire newspaper compilation itself. Moreover, because the advertisement itself did not bear a copyright notice, and the plaintiff asserting protection "failed to show that, after discovering the omission, it made any effort to add the required notice to copies of the advertisement distributed to the public," copyright protection in the advertisement was lost. *Canfield*, 759 F.2d at 499.

C. Eastern failed to allege facts sufficient to show infringement of a copyrighted compilation.

The District Court, Judge Motz presiding, correctly found that the process of recompilation by Respondents does not constitute copyright infringement. "A compilation is capable of being copyrighted even where it merely

consists of a selection of arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compiliation of a protectable literary work . . . ." *Southern Bell Tel.*, 756 F.2d at 809. Moreover, copyright law only requires that the author make "a new arrangement or presentation" of the material in order to protect that which is otherwise in the public domain. *Rockford Map Publishing, Inc. v. Director Service Co. of Colorado*, 768 F.2d 145, 149 (7th Cir. 1985). "Here, however, [Petitioner] has failed to allege facts sufficient to show that [Respondents] have copied an original work or a compiliation." *Eastern Publishing and Advertising, Inc. v. Chesapeake Publishing and Advertising, Inc.*, Civil No. JFM-86-1653, (D.Md. Dec. 12, 1986), (A-22).

The averments in Petitioner's Amended Complaint defeat a claim for copyright infringement. Petitioner alleges that "certain Defendants . . . cut out certain portions of Plaintiff's protected works, repositioned certain portions thereof [and] pasted these portions together." *Id.* at Appendix F, p. 21a. Consequently, Petitioner's Amended Complaint alleges that Respondents have recompiled government publications, which are not copyrightable, from a compiled source which lacks copyright protection.

Absent more specific factual allegations which, if proven to be true, would demonstrate that Petitioner's compilation was sufficiently original to merit copyright protection, and that the failure to include copyright notice was excused pursuant to 17 U.S.C. § 405(a), the Amended Complaint insufficiently states a claim upon which relief can be granted.

III. THE CIRCUIT COURT CORRECTLY DISMISSED PETITIONER'S AMENDED COMPLAINT PURSUANT TO FEDERAL RULE OF CIVIL PROCEDURE 12(b)(6).

A. Dismissal for failure to state a claim upon which relief can be granted is proper when the complaint fails to allege essential elements of a cause of action.

A complaint should be dismissed when it fails to allege the essential elements of the cause of action asserted. *Shewmaker v. Minchew*, 666 F.2d 616, 617 (D.C. Cir. 1981) (per curiam). Moreover, when the complaint fails to allege compliance with the copyright registration requirements, a motion to dismiss a copyright infringement claim should be granted. *Quincy Cablesystems, Inc. v. Sully's Bar, Inc.*, 650 F. Supp. 838, 851 (D. Mass. 1986).

In this action the dismissal was appropriate as Petitioner failed to allege, in the original and Amended Complaints, the essential elements of the causes of action asserted. Accordingly, the Amended Complaint was properly dismissed "under Rule 12(b)(6) since it is clear from the face of the complaint that [petitioner] can prove no set of facts that would entitle [it] to relief." *Madison v. United States*, 752 F.2d 607, 609 (11th Cir. 1985).

Because the Amended Complaint failed to allege the essential prerequisites to these causes of action, there are no circumstances which can be proven which would entitle Petitioner to relief.

CONCLUSION

For the reasons stated above, Respondents, Chesapeake Publishing and Advertising, Inc., *et al.* respectfully request that this Court deny Petitioner's Writ of Certiorari.

Respectfully submitted,

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APPENDICES

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

EASTERN PUBLISHING AND ADVERTISING INC., (A Close Corporation), t/a "ARMED FORCES NEWS,"
Plaintiff-Appellant,

versus

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "THE MILITARY NEWS"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITNEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CANNOLES; LOUISE MARTINS,
Defendants-Appellees.

On Remand from the United States Supreme Court
(C/A 86-1653-JFM)

Submitted: August 8, 1990

Decided: February 9, 1990

Before ERVIN, Chief Judge, and PHILLIPS and WILKINSON, Circuit Judges.

William Edward Seekford for Appellant. Henry R. Lord; John J. Kuchno, PIPER & MARBURY; Charles Martinez; ECCLESTON AND WOLF, for Appellees.

PER CURIAM:

This case is before us on remand from the Supreme Court, which vacated our earlier opinion, *see* 831 F.2d 488 (4th Cir. 1987), and remanded for reconsideration in light of *H.J. Inc. v. Northwestern Bell Telephone Co.*, —— U.S.——, 109 S.Ct. 2893 (1989). *See Eastern Publishing and Advertising, Inc., t/a "Armed Forces News" v. Chesapeake Publishing and Advertising, Inc., t/a "The Military News", et al.*, —— U.S. ——, 57 U.S.L.W. 3858 (U./S. July 3, 1989).

The issue upon which the Supreme Court granted certiorari was whether, as we earlier held, the district court properly dismissed Eastern's civil RICO claim for failure of the complaint to allege a "pattern" of racketeering activity. Our reconsideration has therefore been limited to whether, in light of *H.J., Inc.*, we erred in our holding on that issue.

Upon reconsideration, with the benefit of supplemental briefing by the parties, we have concluded that *H.J., Inc.* does not require any revision of our original opinion on that issue, and that it should therefore stand as the decision of this court.

Essentially, we conclude that our analysis of the insufficiency of the "pattern" allegations in our earlier opinion, *see* 831 F.2d at 491-93, remains sound and unaffected by the Supreme Court's opinion in *H.J., Inc.* Our earlier analysis rested on a perception that though the complaint alleged the requisite number of predicate acts of mail and wire fraud, and a sufficient relationship between them, it failed to allege sufficient continuity or threat of continuity to constitute the type "pattern" of activity contemplated by the RICO statute. As we had in earlier decisions, we identified as a significant feature of the activities alleged that they amounted in the end to no more than "a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context." *Id.* at 492.

The aspect of *H.J., Inc.* that touches most directly upon our analysis is the Court's emphasis that sufficient continuity or threat of continuity to satisfy that element of the pattern requirement may be found even in "closed-ended" single "schemes". In particular, the Court emphasized that the sheer duration of such a scheme, even though it had been brought to fruition and was "closed", might suffice to demonstrate a threat of recurrence, hence "continuity." *See H.J., Inc.*, 109 S. Ct. at 2902 (closed-ended activity "over a substantial period of time").

We have carefully considered the implications of this emphasis in *H.J., Inc.* for our earlier analysis, and are satisfied that it does not require rejection of that analysis. Here, the activities upon which plaintiffs relied as establishing a "pattern" lasted and were brought to fruition with the accomplishment of their limited purpose over a period of only three months—from March through April 1986. All the predicate acts of mail and wire fraud alleged occurred within that period, and the alleged end purpose of the activities was allegedly then accomplished.

We adhere to our earlier opinion that the "closed-ended" scheme to defraud here alleged did not demonstrate the requisite continuity or threat of continuity—either by its intrinsic nature or sheer duration—to constitute a "pattern" of "racketeering activity" within the meaning of the civil RICO statute. *Cf. Walk v. The Baltimore & Ohio RR*, —— F.2d —— No. 87-3585 (4th Cir. Nov. 30, 1989) (finding sufficient continuity in ten years duration of closed-ended scheme, on remand from Supreme Court for reconsideration in light of *H.J., Inc.*).

And on that basis, we adhere to our affirmance of the district court judgment.

SO ORDERED.

APPENDIX B

No. 87-1530

Eastern Publishing and Advertising, Inc., t/a "Armed Forces News", Petitioner v. Chesapeake Publishing and Advertising, Inc., t/a "The Military News", et al.

July 3, 1989. On petition for writ of certiorari to the United States Court of Appeals for the fourth Circuit. The petition for writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit, for further consideration in light of *H.J. Inc. v. Northwestern Bell Telephone Company*, 492 U.S. ——, 106 L. Ed. 2d 195, 109 S. Ct ——— (1989). The Chief Justice, Justice White, Justice Stevens and Justice O'Connor would deny certiorari.

Same case below, 831 F.2d 488.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

EASTERN PUBLISHING AND ADVERTISING, INC.,
(A Close Corporation), t/a "ARMED FORCES NEWS",
Plaintiff-Appellant,

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC., (A Close Corporation), t/a "THE MILITARY NEWS"; KAREN A. HORN; KIMBERLY J. HORN; CAROL WHITENEY ANSELL; DELLA LEMMINGS; ALFRED E. CLASING, III; RAYMOND J. CONNOLES; LOUISE MARTINS,
Defendant-Appellees.

Appeal from the United States District Court
for the District of Maryland, at Baltimore
J. Frederick Motz, District Judge—(CA-86-1653-JFM)

Argued: June 29, 1987 Decided October 16, 1987

Before PHILLIPS, ERVIN, and WILKINSON,
Circuit Judges

William Edward Seekford for Appellant; John Joseph Kuchno (Henry R. Lord; Piper & Marbury; Charles Martinez; Eccleston & Seidler on brief) for Appellees.

PHILLIPS, Circuit Judge:

Appellant Eastern Publishing and Advertising, Inc. (Eastern), appeals the Rule 12(b)(6) dismissal of its claims against a competing publisher, Chesapeake Publishing and Advertising, Inc. (Chesapeake), former Eastern employees, and former associates in the law firm that represents Eastern, alleging copyright infringement and R.I.C.O. and antitrust violations. We affirm the dismissal of the copyright claim because Eastern failed to attach the requisite notice to the advertisements and to the issues of its newspaper, "Armed Forces News," on which it claims copyrights. We also affirm dismissal of the civil R.I.C.O. and antitrust claims on the grounds relied upon by the district court.

I

Eastern publishes a quarterly newspaper, "Armed Forces News," which is directed to military personnel and their dependents and which consists of original advertising and publicly available government press releases. Chesapeake publishes a competing newspaper, "The Military News." Claiming that its publication is entitled to copyright protection as a "compilation" under 17 U.S.C. §§ 101, 103, even though the government publications that make up the newspaper are not themselves copyrightable, 17 U.S.C. § 101, Eastern claimed that Chesapeake infringed its copyrights in two issues of the "Armed Forces News," Volume V, Number III and Volume VI, Number IV. Eastern also claimed that Chesapeake infringed valid copyrights in individual advertisements appearing in those same issues. Volume V, Number III first was published on March 22, 1986, and Volume VI, Number IV on March 27, 1986. Eastern registered copyrights in these materials on May 9 and May 20, 1986, respectively. Copyright notices appeared on subsequent issues of the publication. No copyright notices appeared on the advertisements.

Appellees Karen Horn, Kimberly Horn, Carol Ansell, and Della Lemmings were employees of Eastern until April 1986. Appellees Alfred Clasing and Raymond Cannoles worked with the law firm retained by Eastern before formation of Chesapeake; appellee Louise Martins currently works with Clasing and Cannoles. Clasing, Cannoles, and Martin are Chesapeake directors, and Karen Horn is the company're resident agent. According to Eastern's complaint, the various named defendants were responsible for photocopying, cutting apart, and reassembling Volume V, Number III and Volume VI, Number IV of "Armed Forces News" to create and publish "The Military News." Eastern further alleged that unidentified defendants represented to Eastern's advertising customers that Chesapeake was connected to Eastern and that the customers could renew their advertisements in Eastern's publication through Chesapeake. These customer contacts were alleged to have taken place through the mails and by interstate wire and telephone transmissions on various occasions during March, April, and May 1986.

In addition to claiming that publication of "The Military News" infringed Eastern's copyrights, Eastern charged that Chesapeake's exploitation of its customers led to a decline in the number of "Armed Forces News" customers, while the number of Chesapeake's customers increased to the point that Chesapeake now controls the relevant market. Thus, according to Eastern, Chesapeake's activities have injured competition in violation of federal antitrust laws, 15 U.S.C. §§ 1-15. Eastern did not allege before the district court that any other competitor beside itself had been injured, but on appeal Eastern submits that at least three other competitors exist and that at least one of these has been injured competitively. Finally, Eastern charged Chesapeake with civil R.I.C.O. violations for having committed multiple acts of mail and wire fraud in misleading Eastern's cus-

tomers into publishing advertisements in "The Military News."

In ruling on appellees' 12(b)(6) motion, the district court found: (1) there was no copyright infringement because defendant's publication amounted to a recompilation of the copyrighted issues of "Armed Forces News"; (2) there was not "pattern" of racketeering activity to support the R.I.C.O. claim; and (3) the facts alleged did not demonstrate the injury to competition required for an antitrust claim.

This appeal followed.

II

Eastern claims copyright in two separate sets of material: (1) advertisements published in "Armed Forces News"; and (2) particular issues of the newspaper, Volume V, Number III and Volume VI, Number IV. To succeed on a copyright claim, one asserting copyright protection must have registered the copyright, 17 U.S.C. § 411(A); *Conan Properties, Inc. v. Mattel, Inc.*, 601 F. Supp. 1179, 1182 (S.D.N.Y. 1984). *International Trade Management, Inc. v. United States*, 553 F. Supp. 402 (Ct. Cl. 1982), and must also have attached notice of copyright on all publicly distributed copies of the protected item. 17 U.S.C. § 401(a); *e.g., M. Kramer Manufacturing Co. v. Andrews*, 783 F.2d 421, 443 (4th Cir. 1986).

No notice appeared on the individual advertisements. 17 U.S.C. § 404(a) permits a copyright notice on a compilation of work as a whole to cover individual parts of the whole, unless the individual part is an advertisement for the benefit of someone other than the holder of the copyright in the entire collective work. A newspaper claiming copyright ownership in an advertisement prepared for another must give specific and separate notice of its copyright in the advertisement. *See Canfield v. Ponchotoula Times*, 759 F.2d 493 (5th Cir. 1985).

Therefore, even if notice of copyright was affixed properly to the newspaper to cover the publication as a whole, that notice would not cover the individual advertisements, and there can be no copyright infringement as to them.

There also was no notice on the two issues of "Armed Forces News" for which copyrights were registered on May 9 and May 20, 1986. Assuming these issues were copyrightable as "compilations," which are selections or arrangements of even uncopyrightable material in an original way, *see Southern Bell Telephone and Telegraph Co. v. Associated Telephone Director Publishers*, 756 F.2d 801, 809 (11th Cir. 1985), the registered copyrights lend no protection to Eastern unless the failure to place notice upon them is excused under 17 C.F.R. § 405 (a). Section 405(a)(2) excuses omission of notice if

> registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered.

Eastern, having registered copyrights in the March 22 and March 27 issues on May 9 and May 20, and having placed general copyright notices on subsequent issues of the "Armed Forces News," claims that its copyright is preserved by the § 405(a)(2) excuse.

The District Court declined, in dictum, to excuse the failure to give notice under § 405(a)(2) because it believed this section of the Copyright Act "is most clearly applicable to products identical to one another which are in continuous production," citing *Original Appalachian Artworks, Inc. v. Toy Loft*, 684 F.2d 821, 826-27 (11th Cir. 1982) (dolls); *Shapiro & Son Bedspread Corp. v. Royal Mills Associates*, 568 F. Supp. 972, 976-77 (S.D. N.Y. 1983) (bedspreads); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F. Supp. 1305 (S.D.N.Y. 1982)

site minimal number of sufficiently related predicate acts would not constitute the "pattern" of racketeering activity contemplated by Congress. *Id.* Such a single, limited scheme we thought was not the kind of "ongoing unlawful activities whose scope and persistence pose a special threat to social well-being." *Id.* While we recognized that a scheme properly considered to be a "single" one might by virtue of its very size and continuity meet the test, we thought the typical fraudulent schemes, limited in occurrence, in scope, and in purpose, that have been the traditional subjects of state tort law were not intended to be swept into R.I.C.O.'s reach by Congress. *Id.*

On this basis we concluded that a R.I.C.O. complaint by investors alleging as predicate acts two violations of the securities laws in connection with the sale of securities did not sufficiently allege a pattern of R.I.C.O. activity. We held that the conduct charged was instead merely that of a "single, limited scheme" to defraud. Though it met the technical requirements of a sufficient number of predicate acts sufficiently related to each other, it failed to charge the kind and degree of continuous engagement in criminal conduct required to constitute a R.I.C.O. "pattern."

We think exactly the same analysis applies to the conduct charged here. The predicate mail and wire fraud acts charged are sufficient in number. They are sufficiently related in allegedly furthering Chesapeake's efforts to gain a competitive edge over Eastern. But in the end all that results is a single, non-recurring scheme to defraud a single entity by taking unfair competitive advantage in a quite narrow business context. There is no inference that the scheme embodies a threat of continued like activity in the future. Just as the scheme alleged in *Zepkin* was found wanting in the required degree of continuity of conduct, so is that here. The complaint fails to allege a R.I.C.O. pattern of racketeer-

ing activity. *See Medallion TV Enterprises v. SELECTV of California, Inc.*, 627 F. Supp. 1290, 1296-97 (C.D. Cal. 1986) (series of calls and letters over a two-month period constitutes a single criminal episode, not a "pattern of activity"); *Phelps v. Wichita Eagle-Beacon*, 632 F. Supp. 1164, 1171-72 (D. Kan. 1986) (several telephone conversations and mailings in furtherance of single ongoing scheme to harm plaintiff not a R.I.C.O. "pattern"); *Grant v. Union Bank*, 629 F. Supp. 570, 578 (D. Utah 1986) (multiple mail and wire conviction in furtherance of single fraudulent loan scheme not a R.I.C.O. pattern); *cf. Temporaries, Inc. v. Maryland National Bank*, 638 F. Supp. 118 (D. Md. 1986) (recognizing that single open-ended scheme might be so extensive in potential scope as to constitute pattern); *see also HMK Corp. v. Walsey*, —— F.2d ——, No. 86-3582 (4th Cir. Sept. 17, 1987) (applying *Zepkin* to find no pattern in single scheme extending over long period and involving many predicate acts aimed as corrupting political processes to gain competitive advantage).

IV

Eastern's antitrust claim is based upon the defendants' acts of copyright infringement and appropriation of confidential business information. The district court held this not to be the type of conduct at which the antitrust laws are aimed, and we agree. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F.2d 1271, 1283 (7th Cir. 1983). Moreover, the antitrust laws are inapposite here because the only damage is to Eastern as a *competitor*; there is no alleged injury to *competition* in the relevant market. *See id.*, at 1284-85; *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). Eastern complains on appeal that in finding no injury to competition, the district court erroneously believes that there were no competitors in the market other than Eastern and Chesapeake. The court noted that before the creation of Chesapeake, there was only

one market entity, Eastern, and that if events transpire as Eastern predicts, there will only be one market entity, Chesapeake. Therefore, there was no injury to competition. Eastern now avers for the first time that there are other competitors who are also harmed by Chesapeake's activities. We decline to take into account these other alleged competitors because their existence and injury were not averred in the complaint nor in any way suggested to the district court.

AFFIRMED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1520

EASTERN PUBLISHING and
ADVERTISING, INC., ETC.,
Appellant,

versus

CHESAPEAKE PUBLISHING and
ADVERTISING, INC., ETC., *et al.*,
Appellees.

On Petition for Rehearing with
Suggestion for Rehearing In Banc

ORDER

The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of the Court requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that leave to file the petition for rehearing out of time is granted and the petition for rehearing and suggestion for rehearing in banc is denied.

Entered at the direction of Judge Phillips, with the concurrence of Judge Ervin and Judge Wilkinson.

For the Court,

/s/ John M. Greacen
Clerk

APPENDIX E

NOTICE OF ISSUANCE OF MANDATE

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

November 27, 1987

TO: U.S. District Court for the District of Maryland at Baltimore

RE: 87-5120 Eastern Publishing v. Chesapeake Publish
CA-86-1653-JFM

HEREWITH IS THE MANDATE OF THIS COURT IN THE ABOVE-ENTITLED APPEAL. The certified judgment and original record on appeal are returned ONLY to the district court/agency.

Enclosures:

× Opinion and Certified copy of the judgment

× Bill of costs form

× Original record on appeal consisting of

2 Volumes of pleadings

1 Volumes of transcripts

———Volumes of Exhibits

———Volumes other

3 TOTAL VOLUMES

———The record will be returned at a later date.

———The record was never transmitted by the D/Ct.

———Other———

Please acknowledge receipt of these documents on the enclosed copy of this notice.

JOHN M. GREACEN,
Clerk

By: _____
E. MARSHALL BUCKLES
Deputy Clerk

Copies of this notice forwarded to:

William Edward Seekford, Esq.
Henry Robbins Lord, Esq.
John Joseph Kuchno, Esq.

APPENDIX F

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC.

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.

MEMORANDUM

Eastern Publishing and Advertising, Inc. has brought this action against persons formerly associated with it and against a new company, Chesapeake Publishing and Advertising, Inc., which these persons formed. Eastern publishes "Armed Forces News," a quarterly newspaper consisting of original advertising and publicly available government press releases. Defendants now publish a competing newspaper called "The Military News."

Eastern's original complaint contains claims for copyright infringement, willful copyright infringement, RICO violations, anti-trust violations, fraud, and unfair competition. After a hearing, this Court granted motions to dismiss filed by defendants as to the original complaint and granted plaintiff leave of Court to file an amended complaint. An amended complaint has now been filed which, except for the deletion of the fraud claim, is substantially identical to the original complaint. Defendants have renewed their motions to dismiss.

There is no diversity of citizenship between the parties and the only asserted basis for the subject matter jurisdiction of this Court is its federal question jurisdiction over the copyright, RICO and anti-trust claims. Since the Court finds that plaintiff has not stated any claim

for relief on these federal claims, it will decline to exercise its pendent jurdisdiction over whatever state law claims plaintiff may be asserting and will not reach the legal issues raised by those claims. *Copyright infringement Claims.*

Section 411(a) of Title 17 of the United States Code provides that "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title." In the amended complaint plaintiff has identified only two issues of the Armed Forces News which have been properly registered. Accordingly, plaintiff's copyright claims are limited to those two issues. *See, e.g., Conan Properties, Inc. v. Mattel, Inc.*, 601 F.Supp. 1179, 1182 (S.D.N.Y. 1984); *International Trade Management, Inc. v. United States*, 553 F.Supp. 402 (Ct. Cl. 1982).

Eastern alleges that the two issues in question contain two types of copyrighted material: original advertising and a compilation of government publications (which are not themselves copyrightable). Eastern has never—either at the time of the original publication or since—placed notices of copyright upon the individual advertisements. Its failure to do so bars it from asserting that its copyrights for those advertisements have been infringed. *See Canfield v. Ponchatoula Times*, 759 F2d 593 (5th Cir. 1985).

The two issues in question likewise did not include notices of copyright. Eastern has placed copyright notices on subsequent issues and argues that the lack of notice on the prior ones is therefore excused under 17 U.S.C. section 405(a)(2). Section 405(a)(2) provides that omission of the copyright notice does not invalidate the copyright if "registration for the work has been made before or is made within five years after the publication without notice, and a reasonable effort is made to add notice to all copies or phonograph records that are dis-

tributed to the public in the United States after the omission has been discovered." This section is most clearly applicable to products identical to one another which are in continuous production.* *See e.g., Original Appalachian Art Works, Inc. v. Toy Loft*, 684 F2d 821, 826-27 (11th Cir. 1982) (dolls); *Shapiro & Son Bedspread Corp. v. Royal Mills*, 568 F.Supp. 972, 976-77 (S.D.N.Y. 1983) (bedspreads); *Beacon Looms, Inc. v. S. Lichtenberg & Co.*, 552 F.Supp. 1305 (curtains). It is difficult to understand conceptually the application of a single publication, and this Court questions whether it does apply in such a context. *But see Canfield v. Ponchatoula Times, supra.* However, this issue need not be addressed here, for Eastern has failed to allege facts sufficient to show that defendants have infringed any copyrighted compilation.**

17 U.S.C. section 101 defines a compilation as "a work formed by the collection and assembling of the existing materials or of data that are selected, coordinated, or arranged in such a way that the resulting work as a whole constitutes an original work of authorship . . ." The fact that the materials compiled in the "Armed Forces News" are government publications, which are not copyrightable, 17 U.S.C. section 105, is not dispositive. "A compilation is capable of being copyrighted even where it merely consists of a selection or arrangement of facts which individually would not be copyrightable but the originality involved in the selection and/or arrangement of such facts is sufficient to constitute the resulting compilation of a protectable literary work . . ."

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* Eastern also argues in its memorandum opposing defendants' motions to dismiss that section 405(a)(1) applies. However, the amended complaint alleges no facts to support that conclusion.

** By the same token the Court need not reach the question of whether a deliberate omission of the notice of copyright invalidates the copyright. *Compare Hasbro Bradley, Inc. v. Sparkle Toys, Inc.*, 780 F2d 189, 194-96 (2d Cir. 1985) with *Beacon Looms, Inc. v. S. Lichtenberg & Co., supra.*

Southern Bell Tel. & Tel. v. Assoc. Telephone Dir., 756 F2d 801, 809 (11th Cir. 1985). Here, however, Eastern has failed to allege facts sufficient to show that defendants have copied an original work or a compilation. To the contrary, Eastern claims that "certain Defendants . . . cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof [and] pasted these portions together." Similarly, Eastern alleges that defendants "took the cutout portions of Plaintiff's newspapers containing copyright protection and reassembled, retouched . . . and removed certain identifying wording from it." Thus, according to Eastern itself, defendants have recompiled the compilation. Absent more specific averments (which Eastern has failed to make despite having been given the opportunity to do so), this process of recompilation cannot be said to constitute copyright infringement.

RICO Claim

The predicate acts upon which Eastern relies as a basis for its RICO claim all relate to a single alleged scheme. Defendants are alleged to have breached duties which they owed to Eastern by establishing "The Military News" while still working for Eastern and to have wrongfully appropriated materials from the "Armed Forces News." What constitutes a "pattern of racketeering activity" under RICO is, of course, subject to continuing disagreement, and the Fourth Circuit has not yet provided definitive guidance on the point. Whether such a pattern can exist only where there are more than two alleged schemes or episodes, *see Frankart Distributors, Inc. v. RMR Advertising*, 632 F. Supp. 1198, 1200 (S.D. N.Y. 1986); *Northern Trust Bank/O'Hare, & A v. Inryco Co.*, 615 F. Supp. 828, 831 (N.D. Ill. 1985), or whether it may inhere in a single open-ended scheme, *see, e.g., Temporaries, Inc. v. Maryland National Bank*, Civil No. Y-84-4519 (D. Md. June 6, 1986), has not been settled. However, while there may be some authority to

the contrary, *see, e.g., R.A.G.S. Couture, Inc. v. Hyatt*, 774 F.2d 1350 (5th Cir. 1985); *Conan Properties, Inc. v. Mattel, supra*, this Court is firmly of the view that a single scheme with a single defined purpose and a single victim is not sufficient to meet the pattern requirement even if numerous acts of fraudulent mailing or wire communications are made to effect the scheme. *See generally Sedima, S.P.R.L. v. Imrex Co.*, 105 S.Ct. 3275 (1985). Since Eastern alleges only such a single scheme, its RICO claim fails.

Anti-Trust Claims

Eastern's anti-trust claims are grounded upon defendants' alleged acts of copyright infringement and appropriation of Eastern's confidential business information. Although, as this Court suggested to Eastern's counsel during oral argument on the original motions to dismiss, these alleged wrongs may give rise to various state causes of action, they do not constitute the type of conduct which the anti-trust laws are designed to protect against. *See Bunker Ramo Corp. v. United Business Forms, Inc.*, 713 F2d 1272, 1283 (7th Cir. 1983). Eastern alleges that defendants' alleged wrongful acts will damage competition, but the facts alleged by Eastern made it clear that all that is actually being alleged is damage to Eastern as a competitor. No cognizable antitrust injury, which Eastern concedes is required, *see, e.g. Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488-89 (1977), has been alleged. This is apparent from the simple fact that prior to defendants' actions, there was one competitor (Eastern) in what Eastern alleges to be the relevant geographical and product markets and, if defendants are successful in driving Eastern out of business (as Eastern alleges they are trying to do), there will be one competitor (Chesapeake) in the relevant markets. This fact makes clear that this is a classic case in which what is actually being alleged is unfair competition in the guise of an anti-trust claim.

For these reasons, defendants' motions to dismiss will be granted. A separate order to that effect is being entered herewith.

/s/ J. Frederick Motz
United States
District Judge

Date: December 12, 1986

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC.

v.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC.

ORDER

For the reasons stated in the memorandum entered herein, it is this 12th day of December, 1986,

ORDERED that defendants' motions to dismiss be granted.

/s/ J. Frederick Motz
United States
District Judge

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. JFM-86-1653

EASTERN PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "ARMED FORCES NEWS, 619-A South Marlyn Avenue, Baltimore, Maryland 21221,

Plaintiff

vs.

CHESAPEAKE PUBLISHING AND ADVERTISING, INC. (A CLOSE CORPORATION) T/A "THE MILITARY NEWS" 6 North Taylor Avenue, Baltimore, Maryland 21221

and

KAREN A. HORN
6 North Taylor Avenue
Baltimore, Maryland 21221

and

KIMBERLY J. HORN
6 North Taylor Avenue
Baltimore, Maryland 21221

and

CAROL WHITNEY ANSELL
6 North Taylor Avenue
Baltimore, Maryland 21221

and

DELLA LEMMINGS
6 North Taylor Avenue
Baltimore, Maryland 21221

and

ALFRED E. CLASING, III
818 Eastern Boulevard
Baltimore, Maryland 21221

and

RAYMOND J. CANNOLES
818 Eastern Boulevard
Baltimore, Maryland 21221

and

LOUISE MARTINS
818 Eastern Boulevard
Baltimore, Maryland 21221,
Defendant

AMENDED COMPLAINT
and
ELECTION FOR JURY TRIAL

I. NATURE OF THE ACTION

This Complaint arises out of Plaintiff's publications; as well as a creation of fixed works with exclusive rights of publication, titled "Armed Forces News", as well as Insurance Adjuster's Guide, Veterans News and other publications of Plaintiff *inter alia*, which are newspapers and publications serially prepared, and produced and which are printed quarterly in the District of Maryland and published and distributed, by region, throughout the United States. The paper entitled "Armed Forces News" is also a collective work which embodies Plaintiff's original advertising, design, wording, lettering, art work and configurations, which is fixed as an original together with a specific combination and compilation by selection, coordination, placement, arrangement and assemblage of prior issued and published government press releases which is entitled to and possesses federal statutory copyright protection owned by Plaintiff. Certain of those

serially published newspapers have also been properly registered pursuant to the Copyright Act of 1976, *Title 17, United States Code, Section 101, et seq.* prior to the filing of this suit and have received certificates of Copyright Registration effective prior to the filing of this suit. Claims represented *inter alia* herein allege copyright infringement in violation of that Act by Defendants.

This Complaint also states a claim for an unlawful and prohibited restraint of trade with unfair competition in trade contrary to the provisions of *Title 15, United States Code, Sections 1-15.*

The Complaint also alleges the knowing, wilful, fraudulent and unlawful conduct of Defendants in fraudulently misrepresenting directly and indirectly, that the various Defendant organizations are the same as, or part of, or connected with or have the right to use copyright materials of Plaintiff, and other such unlawful frauds and misrepresentations, set forth more fully, infra. Defendants utilized the United States Mail and interstate wire and telephone transmissions to pursue their fraudulent conduct. This part of the action arises in fraud, copyright infringement fraud and under the Racketeers Influenced and Corrupt Organizations Act of 1978, as amended, *Title 18, United States Code, Section 1961, et seq.* (hereinafter sometimes cited as "RICO" and "RICO ACT").

II. PARTIES

2a. Plaintiff, Eastern Publishing and Advertising, Inc. (A Close Corporation) is organized and exists pursuant to the laws of the State of Maryland with its principal office at 619-A South Marlyn Avenue, Baltimore, Maryland 21221.

2b. Plaintiff is and has been the employer of persons who occasionally while so employed have created "works for hire" as "fixed" original literary works, designs, drawings, art works, art forms, art and word composi-

tions, together with selective compilation and configuration of released Pentagon and other government reports, notices and press released for Plaintiff some of which are obtained for Plaintiff only by Plaintiff's employees utilizing authorized Pentagon press passes of Plaintiff. Plaintiff is the lawful holder of all copyrights arising therefrom. Plaintiff is also the owner of certain property more particularly described, infra. Plaintiff has not conveyed or assigned such copyrights to Defendants, their enterprise or any other entity.

3a. Defendant "Chesapeake Publishing and Advertising, Inc." (A close Corporation) was recently organized pursuant to the laws of the State of Maryland with its principal office at 6 North Taylor Avenue, Baltimore, Maryland 21221. (Hereinafter sometimes called "Chesapeake").

3b. Defendant Chesapeake is engaged in selling advertising, printing and artwork to potential business purchasers thereof whose businesses are located in the State of Virginia, the District of Columbia, and other states of the United States and in so doing is engaging in the printing and publishing thereof in interstate commerce of a publication titled "The Military News" as well as "Veteran's Times", and other publications. Defendant Chesapeake and its agents, servants and employees and members of the "enterprise" utilize interstate wire transmissions and the United States Mail and mailings in furtherance of such business and the businesses of the enterprise and contacting potential customers, Plaintiff's customers, soliciting advertising, and renewal of advertising, making appointments, billing, collecting monies, depositing monies and checks, submitting billings, making refunds, causing the mailings of checks from depositing banks to collecting and payor banks, and delivery of publication copies, all of which is in and affects interstate commerce.

4. Defendant, Karen A. Horn is an individual; a resident of Maryland; the Resident Agent of and upon information and belief at all times relevant was and is a general supervisory employee and a controlling agent of Defendant Chesapeake and its business and employees.

5. Defendant, Kimberly J. Horn is a resident of Maryland, an individual and sister of Defendant, Karen A. Horn and is employed by and is an agent of Defendant Chesapeake and upon information and belief, *inter alia*, with respect to the enterprise and its activities, she assists in contract preparation, billing, invoicing, contracts with customers and controller of other office and client records and office materials.

6. Defendant, Carol Whitney Ansell, a resident of Maryland, is an individual and upon information and belief is employed by Defendant Chesapeake and with respect to the enterprise and its activities she assists in contacting clients, soliciting advertising, billing, collecting payments and other generally related work activities, with the other Chesapeake employees.

7. Defendant, Della Lemmings, a resident of Maryland, is an individual and is employed by and an agent of Defendant Chesapeake and upon information and belief with respect to the enterprise and its activities she is engaged on behalf of Defendant Chesapeake and the enterprise in soliciting advertising customers, assessing sales and space pricing, renewal advertising, getting executed customer contracts, collecting payments therefore, using interstate wire transmissions in furtherance thereof and training new personnel.

8. Defendant, Alfred E. Clasing, III, a resident of Maryland, is an individual and an incorporator of and a director of Defendant Chesapeake and controls the same.

9. Defendant, Raymond J. Cannoles, a resident of Maryland, is an individual and an incorporator of and

a director of Defendant Chesapeake and controls the same.

10. Defendant, Louise Martins, a resident of Maryland, is an individual and an incorporator of and a director of Defendant Chesapeake and controls the same.

11. Upon information and belief there are other and additional John Does and Jane Does, whose true names and identities and their participations are presently unknown to Plaintiff but who, upon discovery, will be made a party to this suit.

11a. These parties are all named as principles for purposes of the federal statutes and involvement since all parties participating in the activities in the manner coming under *Title 18 U.S.C. Section 2 and 371* are principles or co-conspirators and are also principles.

III. JURISDICTION

12. Jurisdiction is invoked pursuant to *Title 28, U.S.C., Section 1331; Section 1391(b)* and *(c)*; and *Title 28, U.S.C., Section 1338(a)* and *(b)*; and *Section 1337(a)*.

This Court's jurisdiction is further authorized pursuant to *Title 18, U.S.C., Section 1964(a)* and *(c)* and *Section 2*.

IV. VENUE

13. This action is properly venued in this Court pursuant to *Title 18, U.S.C., Section 1965(a)* and *(b)*; *Title 28, U.S.C., Section 1400(a)*; and *Title 28, U.S.C., Section 1391(b)* and *(c)*.

a. Defendant Chesapeake Publishing and Advertising, Inc., is a corporation organized and which exists under the laws of Maryland and has its residence and principal office in and transacts its affairs in this and other Districts. *18 U.S.C. Section 1965(a)* and *Section 2* and *28 U.S.C., Section 1391(b)* and *(c)*, and *Section 1400(a)*.

b. Defendant Karen A. Horn resides in and transacts her affairs in this and other Districts.

c. Defendant Kimberly J. Horn resides in and transacts her affairs in this District.

d. Defendant Carol Whitney Ansell resides in and transacts her affairs in this District.

e. Defendant Della Lemmings resides in and transacts her affairs in this and other Districts.

f. Defendant Alfred E. Clasing, III resides in and transacts his affairs in this District.

g. Defendant Raymond J. Cannoles resides in and transacts his affairs in this District.

h. Defendant Louise Martins resides in and transacts her affairs in this District.

V. STATEMENT OF FACTS

14. Plaintiff, at all relevant times herein, was engaged in printing and publishing newspapers, tabloids and reference materials which are usually printed quarterly with each separate serially produced newspaper or tabloid designated to be and is published in geographical areas which in most instances are defined by state boundaries. One of Plaintiff's newspapers is titled "Armed Forces News" and is geared for publication to military personnel and their families and dependents. Other publications include *inter alia* "Veteran's News" and "Labor Union News".

15. The Plaintiff, by its agents, servants and employees solicit advertising customers from the area of distribution who most often repetitively purchase advertising from Plaintiff for their businesses and its goods and services. In fulfilling the purchase and in preparing the advertising, Plaintiff employs persons to perform for it certain "work for hire" including creating designs, art work, drawings, wording, lettering with stroke design

and configuration which are "fixed" for purposes of and are protected by copyright under *Title 17, U.S.C., Sections 101, et seq.*

16. The Plaintiff, by its agents, servants and employees using Plaintiff's Pentagon security press passes also obtains press releases at the Pentagon Press Room together with certain press releases from the federal Department of Labor and the Veteran's Administration as well as notices, written items, articles, memoranda and government press releases issued by various military and government installations which are delivered to and mailed to Plaintiff for inclusion in "Armed Forces News". Plaintiff then has its employees create and "fix" a "compilation", and "work for hire" under *Title 17, U.S.C., Section 103*, which is an originality of combination through selection, coordination, placement, arrangement and their assemblage together with original created fixed works which are of interest to and for consumption by military personnel and their families and dependants in the geographical area of publication.

17. The Plaintiff assembles both the paid advertising with its concomitant fixed copyright protected materials and the original compilation materials into a complete copyright protected newspaper "FLAT". (The original complete pre-printing assemblage from which the images are multiple printed) which is Plaintiff's original fixed copyright work.

18. Plaintiff, with respect to Volume V, Number III, and Vol. VI, No. IV, printed and published copyright materials created, fixed and owned by Plaintiff, registered them with the United States Register of Copyrights in accordance with the statute on May 9, 1986 and May 20, 1986, and received Certificates of Copyright Registration TX-1-819-477 and TX-1-819-476 respectively, with first publication into the State of Virginia for its Virginia advertisers and readers occurring on March 22 and 27, 1986 and by statutory deposit and

filing of registration and of 2 copies thereof of the original work with the Register of Copyrights, Copyright Office, at the Library of Congress pursuant to *Title 17, Sections 405(a)(2), 408, 411* and *412.*

19. Plaintiff, also has deposited other prior published serial issues of this newspaper and the other above publications for copyright registration and has included notice of copyright on all subsequent issues prior to their publication and has registered and deposited the same in accordance with the statute, all such registrations occurring within five (5) years of first publication, including, but not limited to, those published with Florida advertising copyrights. Notice of said copyright claim and registration given to the corporate Defendant and its manager.

20. Plaintiff, pursuant to *Title 17, Section 101, et seq* has the right to bring this action for infringement of said copyrights.

21. Defendants Karen A. Horn, Kimberly J. Horn, Carol Whitney Ansell and Della Lemmings, prior to April 14, 1986, were contracted by Plaintiff under employment contract as were others with various assigned duties, to perform work and labor in the Plaintiff's business and in such work were aware of the fixation of and the original creation of the works at issue by Plaintiff herein and the actual notice of the underlying right of copyright owned and possessed by Plaintiff in those works created herein including, but not limited to, "Armed Forces News" Volume V, Number III, printed and published on March 22, 1986, Volume VI, Number IV, printed and published on March 27, 1986.

22. Plaintiff is informed and believes and therefore alleges that Defendants, Alfred E. Clasing, III, and Raymond J. Cannoles, are attorneys formerly with a law firm utilized and employed by Plaintiff and John E. Tuchton, the sole incorporator, officer, stockholder, di-

rector and managing official of Plaintiff. As such, those Defendants knew and should have known that Plaintiff was engaged in the creation, printing and publishing of the "Armed Forces News" and the "Labor Union News", "Veteran's News" and "Insurance Claims Adjusters Guide" *inter alia* and their original copyright material contained therein owned by Plaintiff. Defendants Clasing and Cannoles also knew and should have known that Defendants Horn, Horn, Ansell and Lemmings were contracted by Plaintiff prior to April 14, 1986 and were involved in the sale of ads in the creation, production, possession, protection of, fixation and publication and care of Plaintiffs copyrighted materials, as well as printed copies of the present, prior and future issues of Plaintiffs various publications and in their key contract positions and duties relative to such copyright material, the compile customers lists, open and closed advertising contracts and other business records, trade secrets, business property and assets and knowing that none of which belonged to or were owned by those contractors employed by Plaintiff. These counsel also knew and had reason to know that on April 2, 1986; April 4, 1986; April 7, 1986; April 11, 1986; April 14, 1986 and April 21, 1986 and each day between those specific dates, and since to the date of this Amended Complaint, Defendants Horn, Horn, Ansell and Lemmings were contract employees or were regular salesman of Plaintiff and that they were not owners of such materials and owed Plaintiff a duty of good faith employment and loyalty and to act during such employment in accordance with the best interests of Plaintiff and its business and property and not to engage in conduct detrimental to Plaintiff's interests or which would be to the best interests of those Defendants and against plaintiffs which conduct would be an act of self dealing and wrongful be a possession and use and takings of Plaintiffs property, trade secrets, customers lists and 'copyright materials as it would be harmful to and in competition with Plaintiff and its rights and business.

23. Defendant Louise Martins, employed in the offices of Defendants Clasing and Cannoles, knew and had reason to know of the facts and matters set forth in paragraph number 22 supra, prior to April 7, 1986 and thereafter.

24. Defendants Clasing, Cannoles and Martins on April 2, 1986 in agreement with Karen Horn and to provide for the creation of a printing and publishing corporaiton during such employment by Plaintiff prepared and executed written Articles of Incorporation for Defendant Chesapeake Publishing and Advertising, Inc. with the authorized purposes to create publications to compete with Plaintiff utilizing their business and employment address at 818 Eastern Boulevard, Baltimore, Maryland 21221 after associating themselves for that purpose. These Defendants were made Directors of that corporation which was a direct competitor against Plaintiff and the principal business address of the new corporation was designated to be 6 Taylor Avenue, Baltimore, Maryland 21221 with Defendant, Karen A. Horn, then employed by Plaintiff, named as resident agent with an address also at 6 Taylor Avenue, Baltimore, Maryland 21221.

25. The Articles of Incorporation were filed on April 4, 1986 at 10:19 a.m. in the Maryland State Department of Assessments and Taxation at Number D-2107894 by Defendant Clasing. The corporation was formed without any assets or contributions that would make it a lawful ongoing publishing concern and it had no customer lists, advertising or self created copyright material.

26. Plaintiff is informed and believes and therefore alleges that upon informaiton and belief Defendants Clasing, Cannoles and Martins knew and had reason to know that the formation and creation of the corporate entity "Chesapeake Publishing and Advertising. Inc." without any necessary capital equipment, inventory, saleable advertising, trade secrets, customer lists and prior

renewable contracts as to lawfully engage in such business was to create a competitor printing and newspaper enterprise which was to employ the then contractors of Plaintiff to solicit advertising customers of Plaintiff, in direct competition with Plaintiff, which corporation was to join the enterprise and to be operated on a day to day basis from April 2, 1986 thereafter, even while Defendants Horn, Horn, Ansell and Lemmings continued to be employed by Plaintiff, while Plaintiff had no knowledge thereof or means to protect itself, and during the time those personnel assembled and took wrongful possession of Plaintiff's property, trade secrets, copyright materials, and confidential customer lists and renewable contracts.

27. Plaintiff is informed and believes and therefore alleges that upon information and belief, Defendants Clasing, Cannoles and Martins knew and had reason to know that Defendant "Chesapeake Publishing and Advertising, Inc." was a new corporation and enterprise which did not rightfully itself possess any advertising customer lists, telephone directories, advertising creations, artwork and any other necessary property to lawfully commence a newspaper business or to carry on such business or to carry out its stated and intended purposes and that in order to engage in the conduct contemplated and complained of herein that they would have to engage in unfair, unlawful competition and restraint of trade and to wrongfully and unlawfully infringe the lawful copyright of creators and the advertising, design, artwork and arrangements entitled to lawful copyright protection owned by their creators including Plaintiff herein.

Further that Defendants Horn, Horn, Ansell and Lemmings knew they had no lawfully obtained advertising material to present to potential customers when the corporation was created and when the business commenced and continued and that they would have to infringe Plaintiff's copyright material since it was the only advertising available or known to them.

Further, all Defendants knew and had reason to know that the newly formed corporation and the enterprise formed by them was without adequate initial capitalization, funding, property, supplies equipment and assets lawfully obtained to lawfully carry out its objectives. That each of the defendants participated with and joined the enterprise and aiding and abetting in the activities thereof.

28. During the period of contracted employment Plaintiff detrimentally relied upon Defendants Karen A. Horn, Kimberly J. Horn, Carol Whitney Ansell, and Della Lemmings to *refrain from* fraudulently (1) telephoning, contacting and soliciting Plaintiff's customers and advertising purchasers on behalf of themselves and any organizations competing with Plaintiff; (2) taking, removing from Plaintiff's possession and utilizing, on behalf of themselves and competing organizations, Plaintiff's non-published customer lists, prior customer contracts, renewal contracts on customers, copies of original copyright protected artwork, design and advertising, copies of prior volumes. Plaintiffs printed newspapers, Plaintiffs telephone directories, telephone criss-cross listings, briefcases with Plaintiffs identity, Plaintiff employee Pentagon press room identification passes, Rand-McNally publications and other properties; (3) falsifying a connection or affiliation between Plaintiff and any other competing organization; (4) fraudulently deceiving Plaintiff's customers and advertisers into believing they had given their prior advertising, contracts, and payments to an affiliated or connected organization of Defendants' and thereby inducing Plaintiffs advertising customers to renew their advertising and advertising contracts with Defendants' corporation thereby also defrauding Plaintiff out of such renewal business and by using the copyright material and advertising of Plaintiff to do so and to produce Defendants infringing news papers containing the advertising unlawfully; (5) to engage in actions creating an illegal restraint of trade

upon Plaintiff using uncompensated infringement materials and tactics; and to assume control of and obtain agreements and payments for advertising created by Plaintiff from Plaintiff's customers while defrauding those customers out of a lawfully created and authorized reproduction of Plaintiff's copyrighted works and also defrauding Plaintiff out of proceeds for such reproduction and advertising arising out of such reproduction and copyright use and such customers to which Plaintiff was entitled.

29. Upon information and belief, no Defendant engaged in any lawful creation of any artwork, design, or advertising which was an original copyright fixed in any work, or themselves produced any newspaper owned by them, that was at any relevant time reproduced, copied, printed and published prior to May 12, 1986, by Chesapeake Publishing and Advertising, Inc. or any other company which copyright was owned or lawfully used by Defendant Chesapeake and the other Defendants in publishing into the State of Virginia. "The Military News" newspaper on or about April 21, 1986 and other such subsequent publishings and newspapers and dates.

30. Defendants, Horn, Horn, Ansell and Lemmings on or about April 11, 1986 left the employ of Plaintiff, wrongfully possessing and unlawfully removing Plaintiff's materials, property and records aforesaid to be used by them and by the enterprise in the unlawful solicitation of Plaintiffs advertising customers through use of the Plaintiff's property and the subsequent infringement of Plaintiffs copyrights in the preparation, printing and publication of their infringing newspaper and printing enterprise and the defrauding of Plaintiff and its customers.

31. Plaintiff is informed and believes and therefore alleges that Defendants, on or before April 21, 1986, commenced the formal business operation of Defendant "Chesapeake" and, upon information and belief, had pre-

viously, while working for Plaintiff, agreed to such premises lease, installation of telephones, had business forms created and made numerous customer contacts, displaying Plaintiff's newspaper as their own as an example of the advertising to be reserved to Plaintiffs customers which was totally owned by Plaintiff who owned all rights of copyright.

32. Since on or about March, 1986 certain Defendants knowingly, wilfully and intentionally, through the United States Mail, fraudulently and falsely have claimed, contended and implied that the soliciting entity—Defendant, "Chesapeake" or "The Military News", by whatever name and Defendants Horn, Horn, Ansell and Lemmings were affiliated with, connected with, or part of Plaintiff and have made numerous postal mailings in furtherance thereof including, but not limited to, mailings of checks, contracts, billings, and invoices and causing the mailing of customers checks by depositing them in Maryland National Bank for clearance by mail to the payor bank and thereafter to the customer by bank statements.

33. Since on or about March, 1986 certain Defendants herein knowingly, wilfully and intentionally used the interstate wire and telephone transmissions to pursue their fraudulent conduct by falsely and fraudulently contacting Plaintiffs advertising customers to seek renewal of Plaintiff's advertising to cause it to be reproduced in Defendant's competing organization newspaper and in so doing have falsely claimed, contended and implied that the soliciting entity—Defendant "Chesapeake" or "The Military News", by whatever name is affiliated with, connected with, or part of Plaintiff and that this contract would be a renewal of Plaintiff's former contract and advertising production.

34. That certain Defendants herein have on several subsequent occasions cut out certain portions of Plaintiff's protected works, re-positioned certain portions thereof, pasted those portions together, removed Plaintiff's identi-

fying marks, and pagination and photocopies those portions into an infringing reproduction newspaper "FLAT" attaching to it the title "The Military News" and published the same to Plaintiff's customers and others in and around the military bases in the northern part of the State of Virginia damaging irreparably Plaintiff's good will and reputation for integrity, diligence and competence built up over many years substituting their inferior photocopies of Plaintiff's works defrauding the renewing customers and Plaintiff.

35. Defendants Chesapeake, Horn, Horn, Ansell and Lemmings have confederated, agreed and conspired knowingly, wilfully and intentionally to commit the aforegoing false and fraudulent acts through the United States Mail and by use of interstate wire and telephone transmissions.

36. Plaintiff is informed and believes and therefore alleges that upon information and belief, all the Defendants knowingly, wilfully and intentionally have participated in the enterprise through a pattern of racketeering activity and have originated, contrived, designed, solicited, counseled and sponsored the fraudulent and infringement activities and pattern of racketeering activity described in paragraphs 28 through 35 or otherwise aided, abetted, counseled, commanded, induced or procured or caused the acts and offenses aforesaid to be committed and under *Title 18, U.S.S., Section 2* are deemed principals in such activities and offenses, and conspirators in those activities under *Title 18, U.S.C., Section 371.*

37. By virtue of the conduct described in Paragraphs 14 through 36 hereof, Defendants and their enterprise knowingly, wilfully and intentionally have engaged in misrepresentation and fraud and false pretenses upon Plaintiff and Plaintiff's business customers, in violation, inter alia, of the common law of Maryland, and Virginia and Plaintiff has been injured in its business by reason of such conduct. Further, that such fraudulent conduct

is in violation of the common law of the States of Virginia and Maryland.

38. That Defendants have devised and intended to devise a scheme and an artifice to defraud and for the obtaining of money and property by means of false and fraudulent pretenses, representations and promises and unlawfully did sell counterfeit advertising, did give away, supply, distribute and furnish for unlawful use counterfeit articles and such articles were unlawfully represented to be and intimated and held out to be such legitimate articles of Plaintiff's for the purpose of executing such scheme and artifice, and attempting to do so, placing and causing to be sent or delivered by the Postal Service, or have taken or received therefrom such matter and thing contrary to *18 U.S.C., Section 1341* and did transmit and cause to be transmitted by means of wire and telephone, communications in interstate commerce, signal and sounds for the purpose of executing such scheme or artifice contrary to *18 U.S.C., Section 1343* all of which constitutes common law fraud upon Plaintiff and Plaintiff's customers and readers and causing harm and injury to Plaintiff.

Count I—Copyright Infringement

39. The facts, matters, claims and allegations set forth in Paragraphs 1 through 38, of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

40. The Defendants, Chesapeake, Horn, Horn, Ansell and Lemmings, upon information and belief, on or after April 14, 1986 in furtherance of the enterprise knowingly, wilfully and intentionally took the cut out portions of Plaintiff's newspapers containing copyright protection and re-assembled, retouched, them, some of such being as identified in Paragraph No. 18 as Vol. V, No. III, and Vol. VI, No. IV., and others hereafter and removed certain identifying wording from it and placed

Defendant Chesapeake's newspaper title onto the re-assembled parts of Plaintiffs newspaper.

41. The named Defendants took this infringing material to "Master Graphics" *inter alia* formerly known by its associated company name of "Cogar Printing" at 3 Riverton Road, Baltimore, Maryland 21230 and had the assemblage and photocopies made "camera ready" for printing purposes.

42. The Defendants thereafter at various times took the "camera ready" infringing photocopies of Plaintiffs publications to the "Carroll County Time" printing company at 201 Railroad Avenue, Westminster, Maryland 21157 where they paid for and knowingly, willfully and unlawfully obtained large copying printings of Plaintiff's copyright material into multiple copies which were delivered back to Defendants on April 21, 1986 and subsequent date and thereafter unlawfully published them by Plaintiffs as part of the enterprises activity.

43. The Defendants unlawfully produced, and used for purposes of verifying to Plaintiff's customer's prior ads, copies of the Plaintiff's newspaper, Volume V, Number III and Vol. VI, No. IV, and prior contracts and advertising and upon information and belief unlawfully delivered and caused to be delivered by publication the infringing work as agreed and in verification of such publication, and unlawfully distributed such publication to Plaintiff's former customers and readers in northern Virginia military installations.

44. Plaintiff, is the exclusive licensee and owner of certain copyrights and is authorized exclusively to license and sub-license the utilization of such copyrighted materials and has the exclusive rights, pursuant to *17, U.S.C., Section 106* to do and authorize specifically the (1) reproduction of the work in copies, (2) prepare derivative works based thereon, (3) distribute copies to the public in a transfer of ownership, et cet., (4) to display the copyrighted work publicly. Plaintiff has not

granted, conveyed or assigned any of those exclusive rights in the copyrighted works possessed by Plaintiff to any of the Defendants herein.

45. Plaintiff is the lawful holder of copyrights to other such published serially produced newspapers and their contents and upon information and belief, Defendants, and the enterprise are and will be infringing those copyrigts also.

46. The unauthorized acts of Defendants in reproduction of the protected works in copies, the preparation of derivative works based thereon, the distribution of copies to the public in a transfer of ownership and the display of the copyrighted work publicly, constitutes the infringement of these valid copyrights of Plaintiff under *17, U.S.S. Section 501.*

47. The remedies at law available to Plaintiff are inadequate. The damages and injuries which Plaintiff has suffered, is suffering, and will continue to suffer, unless Defendants are enjoined, are incapable of definite ascertainment. The delays incident to obtaining relief by way of an action or actions at law would result in further serious and irreparable injury to Plaintiff before relief can be obtained. Furthermore, to endeavor to only seek recovery at law would require great inconvenience and expense to Plaintiff and would not prevent a continuance of Defendant's wrongful and harmful conduct.

48. Defendants' act of infringement alleged above has caused and will continue to cause the copyright owner and Plaintiff as their exclusive holder, to suffer serious and irreparable harm. Such intentional, unlawful, blatant, and substantial infringement can only be remedied by the issuance of injunctive relief pursuant to *17, U.S.C. Section 502* impounding all infringing materials and restraining Defendants the enterprise and all persons acting in concert or participation with them and their agents, servants and employees from exhibiting, reproducing, copying, distribution or copies to the public,

preparing derivative works therefrom and publicly displaying the copyrighted works (including the Works) without permission of the copyright owners.

49. As a consequence of Defendants' infringement of Plaintiff's rights, Plaintiff is entitled to an accounting from the Defendants for all monies and property received, gains, profits, and advantages derived, by Defendants, from this infringements of the Works, and upon such accounting to a decree that Defendants pay over to Plaintiff all sums derived by Defendants by way of profit from such performances and/or exhibition, in an amount not yet known but believed to be in excess of $75,000, together with the actual damages suffered by Plaintiff therein.

50. As a further consequence of Defendants' infringement, Plaintiff has been required to engage legal counsel, incur expenses and hire investigators and pay travel expenses to investigate and maintain this action and Plaintiff has obligated itself to pay said attorneys a written and reasonable fee for their services. Further, Plaintiff has expended and will expend additional sums in maintaining this action which are recoverable in this action.

Count II—Wilful Copyright Infringement
Statutory Damages

51. Plaintiff reavers the allegations contained in Paragraph "1." through "50." of the Complaint as is herein set forth at length.

52. Upon information and belief, defendants have been fully aware since prior to the inception of their infringing acts as herein alleged that the Works and rights therein, were are are protected by the copyright laws of the United States of America, and that notwithstanding such knowledge and awareness, Defendants have willfully and intentionally infringed Plaintiff's rights and works.

53. Upon information and belief, said infringement or infringements by Defendants are willful, as that term is used in *17, U.S.C., Section 504(c)(2).*

54. By reason of these facts, Defendants are liable to Plaintiff for statutory damages in the sum of $50,000 per title of each of the Works protected by Copyright held by Plaintiff and infringed by Defendant.

Count III—RICO (Mail)

55. The claims and facts asserted in Paragraphs 1 through 54 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

56. By virtue of the conduct described in Paragraphs 1 through 54 hereof, Denfandts willfully devised a scheme or artifice to defraud, and for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, alter, give away, distribute, furnish or procure for unlawful use any article or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting to do so did place or caused to be placed in a post office or authorized depository for mail, matters and things to be sent and delivered by the postal service and did take and receive therefrom such matter and things, and which scheme or artifice involved the deposit in the United States Mail *inter alia* of solicitations containing fraudulent and false copyright infringing statements, which statements were known by Defendants to be false and fraudulent and infringing and which statements were made with the purpose and intent of deceiving and defrauding the persons who are addresses on Plaintiff's advertising customer lists and thereby diverting from Plaintiff to their own use and benefit all advertising payments and contributions resulting from said solicitations and further destroying the viability of Plaintiff's property, to wit, Plaintiff's customer advertising list. Defendants also

pursuant thereto placed or caused to be placed therein and delivered by mail according to the direction thereon and placed or caused to be placed in a post office and an authorized postal depository for mail, matter things, to be sent or delivered by the postal service, and have taken and received therefrom matters and things. Said mailings *inter alia* occurred on or about April 16, 1986, April 17, 1986, April 21, 1986, May 9, 1986 and additional dates at Essex, Maryland, Westiminster, Maryland, Manassas, Virginia, Alexandria, Virginia and other places of mailing and receipt.

57. The conduct described in Paragraphs 55, 56, above, is violative of *18, U.S.C., Section 1341.*

58. The conduct described in Paragraphs 55 through 57 of this Complaint constitutes a pattern of racketeering activity within the meaning of *18, U.S.C., Sections 1961(1) and (5)* in that Defendants have engaged in a pattern of racketeering activity and have committed at least two acts, separate but related, of mail and wire fraud within the last ten years and one of which was committed subsequent to May 1, 1985.

59. Defendants "Chesapeake", and Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell, Della Lemmings, Alfred E. Clasing, III, Raymond J. Cannoles, and Louise Martins, are members of the enterprise within the meaning of *18, U.S.C., Section 1961(4).*

60. Defendant "Chesapeake" Company and the other Defendants and the enterprise are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that they regularly prepare for deposit and deposits, or causes to be deposited, in the United States Mail for delivery in interstate commerce substantial quantities of materials which solicit advertising, contracts, deliveries of invoices and checks, and publication of newspapers from Maryland into Virginia and other states and uses interstate mail, wire, transportation and banking.

61. Defendants are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that each causes to be regularly deposited in the United States Mail for delivery in interstate commerce substantial quantities of materials which solicit advertising and delivers checks, bank mailings, bank deposits, letters and other materials in interstate commerce as on the dates and placed of mailing and receipts above and on other numerous and diverse such acts of mail fraud.

62. Defendants and and the enterprise further are engaged in interstate commerce within the meaning of *18, U.S.C. Section 1962(c)* in that it conceives, plans, organizes and orchestrates each and every mailing to which reference is made in this Complaint using the efforts of the other Defendants, customers and interstate banking facilities and mails.

63. Defendants have violated *18, U.S.C. Section 1962(c)* by conducting the business affairs of each of them through a pattern of racketeering activity described in Paragraphs 55 through 62 hereof.

64. Plaintiff has been injured in its business by reason of the pattern of racketeering activity directed against Plaintiff its business and customers and intended and designated to deceive and defraud Plaintiff's customers, advertisers and readers and to defraud Plaintiff of its property and its rights of copyright all within the meaning of *18, U.S.C., Section 1964(c)*.

64a. Plaintiff seeks injunctive relief under *18, U.S.C., Section 1964(a)* and threefold damages with costs, expenses and counsel fees under *18, U.S.C., Section 1964(c)*.

Count IV.—RICO (Wire Fraud)

65. The claims and facts asserted in Paragraphs 1 through 64 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

66. By virtue of the conduct described in Paragraph 1 through 65, Defendants devised a scheme or artifice, which scheme or artifice involved the making of solicitations by telephone in interstate commerce, which solicitations contained fraudulent and false statements, which statements were known by the Defendants to be false and fraudulent and which statements were made with the purpose and intent of deceiving and defrauding Plaintiff and the persons who are addresses on Plaintiff's customer and advertising list and thereby diverting from Plaintiff to their own use and benefit all contributions resulting from said solicitations and advertising and further destroying the viability of Plaintiff's property, to wit, Plaintiff's customer list, Plaintiff's copyright materials, and Plaintiff's readers and advertisers.

67. The conduct described in Paragraphs 65 and 66, supra, is violative of *18, U.S.C., Section 1343.*

68. The conduct described in Paragraphs 65 through 67 of this Complaint constitutes a pattern of racketeering activity within the meaning of *18, U.S.C., Section 1961(1) and (5)* in that Defendants have committed at least two acts, separate but related, of "Racketeering Activity" within the last ten years and one of which was committed subsequent to May 1, 1985. That such use of interstate telephone facilities occurred *inter alia* at Essex, Maryland to and from the State of Virginia and elsewhere on or about April 21, 1986, April 16, 1986, April 17, 1986, April 23, 1986, May 9, 1986, and diverse other times the calls were placed to and from Westminster, Maryland, Manassas, Virginia, Alexandria, Virginia and Fairfax, Virginia among diverse other places.

69. Defendant "Chesapeake", Defendants Karen Horn, Kimberly Horn, Carol Whitney Ansell, Della Lemmings, Alfred E. Clasing, III, Raymond J. Cannoles and Louise Martins, are members of the enterprise within the meaning of *18, U.S.C., Section 1961(4).*

70. Defendant "Chesapeake" Company and the other Defendants are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that each causes to be communicated by wire and telephone, in interstate commerce, substantial numbers of wire solicitations agreements and communications including, but not limited to, the telephone calls set out above.

71. Defendants further are engaged in interstate commerce within the meaning of *18, U.S.C., Section 1962(c)* in that they conceived, planned, organized and orchestrated and caused each and every telephone solicitation and communication to which reference is made in this Complaint.

72. Defendants have violated *18, U.S.C., Section 1962(c)* by conducting the business affairs of the enterprise through a pattern of racketeering activity described in Paragraphs 65 through 71 hereof.

73. Plaintiff has been injured in its business by reason of the pattern of racketeering activity directed against Plaintiff and intended and designated to deceive and defraud Plaintiff's customers, advertisors and readers and to deceive and defraud Plaintiff within the meaning of *18, U.S.C., Section 1964(c)*.

73a. Plaintiff seeks injunctive relief under *18, U.S.C., Section 1964(a)* and threefold damages with costs, expenses and counsel fees under *18, U.S.C., Section 1964(c)*.

Count V—Unlawful Restraint of Trade and Unlawful, Unfair Competition

74. The facts, matters, claims and allegations set forth in Paragraphs 1 through 73 of this Complaint are incorporated into this Count of the Complaint as though fully set forth herein.

75. Plaintiff upon information and belief states that Defendant "Chesapeake" has not made nor incurred the necessary monetary investment, startup expenses and

costs of purchase and leasing of equipment and property and hiring of employees necessary to create a viable newspaper lawfully creating and affixing and publishing copyrighted works of original creation so as to lawfully own the same and lawfully solicit advertising purchases to use such copyright materials.

76. Defendants have infringed Plaintiff's copyrights and unlawfully copied, produced, reproduced, displayed and delivered copies of Plaintiff's copyright to Plaintiff's customers and deceiving those customers as aforesaid and defrauding Plaintiff out of his copyright, royalties, and sales and income based thereon while Defendants have engaged in direct competition with Plaintiff for Plaintiffs own customers and while using, cost free, the copyright materials business and trade secrets, equipment, property and customer lists created at great expense by Plaintiff.

77. Defendants have taken possession of and utilized the property of Plaintiffs in Defendants enterprise and dealings including, but not limited to, those items set forth in Paragraphs 22, 27, 28, and 30 without lawful permission from Plaintiff and without compensating Plaintiff therefore.

78. That the contract Defendants, while contracted by Plaintiff accumulated and assembled and created their competitive business entity contrary to their duty owed to Plaintiff and removed from Plaintiff its business trade secrets and property to be used in direct unlawful competition.

79. That Defendants have wrongfully used those properties and rights of Plaintiff to unfairly and unlawfully compete against Plaintiff in the relevant market area both geographic and product markets, and by reason thereof have been required to meet a lesser financial burden than Plaintiff while engaged in the same business and trade with the same customers and sales, all of which

is directed to a limited amount of and location of potential customers, which were greatly reduced by the unlawful siphoning off of Plaintiff's customers under which facts Plaintiff and the other advertising competition cannot compete.

80. That Defendants activities have created an unlawful anti-competitive effect and are an unlawful restraint of trade upon Plaintiff contrary to *15, U.S.C., Section 1-15* and is resulting in Defendant's obtaining, possessing and exerting a high degree of economic control in the market.

81. That Defendants unlawful and illegal use of Plaintiffs property and restriction of and restraint upon trade in the market are of military bases in the northern part of the State of Virginia as against Plaintiff and the market product of advertising to military personnel and their families at those bases is such that Plaintiff has been denied the right to engage in the ——— trade in copyrighted newspapers and publications supported by advertising in those markets and such activity has caused it harm in its business and loss of business and profit and has compelled it to suffer serious and irreparable harm; to defend Plaintiff's rights and stop the wrongful use of Plaintiff's property; to institute suit to prevent further such unlawful activity and to protect its rights and property; has been required to engage attorneys for such ends and has incurred other costs and expenses and has otherwise been irreparably harmed and injured by the acts of Defendants and their agreement, combination and conspiracy to so act contrary to *15, U.S.C., Section 1-5* and Plaintiff is entitled to recover threefold damages sustained by it with costs, expenses and counsel fees herein under *15, U.S.C., Section 15.*

82. That Defendant corporation "Chesapeake" has, upon information and belief, violated the provisions of *15, U.S.C. Sections 1-15*, against Plaintiff and such violation is also deemed to be the violation of Defendant's

individual directors, officers and agents of Defendant corporation who have authorized, ordered, or done any of the acts constituting in whole or in part such violation under *15, U.S.C., Section 24.*

VI: Prayer

WHEREFORE, Plaintiff requests this Honorable Court to award to Plaintiff relief from the conduct described in this Complaint. Plaintiff prays that this Court award to it:

A. An order to account for all advertising sold in each of Defendant's printings and all profits and expenses incurred.

B. To state the subsequent transport, transfer and deposit of monies and checks written on such accounts for all monies derived through all sales and income from advertising of each of Defendants printed newspapers.

C. All profits derived from their infringing printings.

D. Compensatory damages in a sum yet to be determined, but not less than five hundred thousand dollars ($500,000.00).

E. Punitive damages in the sum of one million five hundred thousand dollars ($1,500,000.00).

F. Treble damages and the cost of the suit, including reasonable attorneys' fees, pursuant to RICO; *Title 15,* and the other statutes relief upon herein.

G. A Permanent Injunction to prevent the alteration or change of corporate documents, ledgers, books, papers accounts and records. And to bar further such actions complained of.

H. Such other relief as the Court may deem necessary and proper.

Respectfully submitted,

EASTERN PUBLISHING AND
ADVERTISING, INC.
Plaintiff

BY:

/s/ William E. Seekford, Esquire
WILLIAM E. SEEKFORD, ESQUIRE
Suite 1302 The Penthouse
28 Allegheny Avenue
Towson, Maryland 21204
(301) 821-6868
Counsel for Plaintiff

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 24th day of September, 1986, copies of the aforegoing Amended Complaint were hand delivered to these Defendants by delivery to their counsel, John J. Kuchno, Esquire, and Cynthia J. Morris, Esquire, 1100 Charles Center South, 36 South Charles Street, Baltimore, Maryland 21201.

/s/ William E. Seekford
WILLIAM E. SEEKFORD

APPENDIX I

STATUTES AND RULES PROVISIONS INVOLVED

17 USC, § 405. Notice of copyright: Omission of notice

(a) Effect of Omission on Copyright. The omission of the copyright notice prescribed by sections 401 through 403 from copies or phonorecords publicly distributed by authority of the copyright owner does not invalidate the copyright in a work if—

(1) the notice has been omitted from no more than a relatively small number of copies of phonorecords distributed to the public; or

(2) registration for the work has been made before or is made within five days after the publication without notice, and a reasonable effort is made to add notice to all copies or phonorecords that are distributed to the public in the United States after the omission has been discovered; or . . .

(b) Effect of Omission or Innocent Infringers.—Any person who innocently infringes a copyright, in reliance upon an authorized copy or phonorecord from which the copyright notice has been omitted, incurs no liability for actual or statutory damages under section 504 for any infringing acts committed before receiving actual notice that registration for the work has been made under section 408, if such person proves that he or she was misled by the omission of notice. In a suit for infringement in such a case the court may allow or disallow recovery for any of the infringer's profits attributable to the infringement, and may enjoin the continuation of the infringing undertaking or may require, as a condition for permitting the continuation of the infringing undertaking, that the infringer pay the copyright owner a reasonable license fee in an amount and on terms fixed by the court.

18 USC, § 1961. Definitions.

As used in this chapter—

(1) "racketeering activity" means (B) any act which is indictable under any of the following provisions of title 18, United States Code: section 1341 (relating to mail fraud), section 1343 (relating to wire fraud),

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

18 USC, § 1984. Civil remedies

(c) Any person injured in his business or property by reason of a violation of section 1962 of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

18 USC, § 1965. Venue and process

(a) Any civil action or proceeding under this chapter against any person may be instituted in the district court of the United States for any district in which such person resides, is found, has an agent, or transacts his affairs.

Rule 12(b)(6). Every defense in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted.